No. 83-2143

In the Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF TENNESSEE, PETITIONER

v.

HARVEY J. STREET

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether respondent's rights under the Confrontation Clause were violated by the reception in evidence of his nontestifying accomplice's confession (which also incriminated respondent) solely for the purpose—underscored by appropriate limiting instructions—of rebutting the respondent's testimony that his own confession, also received in evidence, was a coerced imitation of the accomplice's confession.

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INTEREST OF THE UNITED STATES

This case presents a significant question as to the application of this Court's decision in *Bruton* v. *United States*, 391 U.S. 123 (1968), and more generally, the proper analysis of claims under the Confrontation Clause. As this case well illustrates, misapplication of the teaching of *Bruton* may seriously threaten the truth-seeking function of a criminal trial. In part because of the absence of a majority opinion in *Parker* v. *Randolph*, 442 U.S. 62 (1979), there is evidently uncertainty as to the proper scope of the *Bruton* rule. The resolution of the question presented in this case and the general approach taken to the Confrontation Clause issue will affect federal criminal prosecutions.

STATEMENT

Following a separate jury trial upon an indictment charging him and five others with murder in the first de-

gree, respondent was convicted of that offense and sentenced to life imprisonment. The Tennessee Court of Criminal Appeals reversed the conviction, concluding that the reception in evidence at respondent's trial of the confession of a non-testifying accomplice violated respondent's rights under the Confrontation Clause as interpreted in *Bruton* v. *United States*, 391 U.S. 123 (1968) (Pet. App. A1-A12). The Supreme Court of Tennessee denied the State's application for permission to appeal without opinion (Pet. App. A13).

1. Some time during the night of August 26, 1981, Ben Tester was murdered by burglars who hanged him and ransacked his home in Hampton, Tennessee. On February 22, 1982, the grand jury for Carter County, Tennessee charged respondent, along with five others, with the first degree murder of Tester, charging both that the murder was premeditated and that it was committed in the course of the felony of burglary (J.A. 4-5). Another accomplice, Clifford Peele, was charged separately in connection with the murder of Ben Tester. On the State's motion, respondent's case was severed for purposes of trial from those of his accomplices (J.A. 4).

Prior to trial, respondent moved to suppress an incriminating statement he had made to agents of the Tennessee Bureau of Investigation and other law enforcement officials on September 17, 1981. Following an evidentiary hearing, the motion was denied, the court holding that "the confession of Harvey Joe Street was knowingly, voluntarily and intelligently given" (J.A. 7).

2. a. The prosecution's affirmative case against respondent was built around respondent's confession, which was read to the jury by Tennessee Bureau of Investigation Agent Collins and introduced as an exhibit (see J.A. 25-26, 353-360), and the testimony of investigators concerning the crime scene that tended to corroborate the details of respondent's confession.[1] In that confession re-

[1] We understand that the State had also planned to use Clifford Peele, who was under indictment for the crime but who had not yet been tried, as a witness, pursuant to a cooperation agreement he had reached with the prosecution providing that the State would not seek the death penalty. Pursuant to this plan, Peele was transported to the Unicoi County jail during respondent's trial, so as to make him available as a witness (see J.A. 7). We are advised by the State that the prosecutor decided at the last minute not to call Peele as a witness, because he appeared unreliable and it was feared that he might end up asserting his privilege against self incrimination, as he in fact did at subsequent trials of other participants in the Tester murder and burglary.

spondent described how he and Clifford Peele planned a burglary of Ben Tester's home in order to secure money to buy a large quantity of illegal drugs. Respondent related that he had told Peele that he was unwilling to "help * * * whip" Tester if he were to interrupt them during the burglary (J.A. 354). He described the day before the crime in considerable detail, relating a series of minor thefts designed to secure goods that could be pawned for drug money, interspersed with preparation for the Tester burglary (J.A. 354-356). Respondent then described the burglary in detail. While the burglars were ransacking Tester's house looking for a large sum of cash they believed to be secreted, Tester walked in. Peele assaulted Tester. According to respondent's statement, he "kept telling Cliff 'let's get out of here,'" but Peele replied "'No, we're going to string him up'"; respondent then assisted in gagging Tester (J.A. 357-358). In his September 17 confession respondent acknowledged accompanying his accomplices outside the house, where they proceeded to hang Tester by a rope from an apple tree, but in that account he played a relatively passive role in the actual hanging (J.A. 358). Subsequently, however, on June 27, 1982, respondent gave a further statement, related at trial by a witness thereto, in which he acknowledged having helped to place the noose around Tester's neck, although he claimed to have done so under some duress (J.A. 76).

b. Respondent's defense case was based upon presentation of alibi witnesses who placed him at locations other than the scene of the crime on the evening of the crime,

and on his testimony in his own defense. Respondent's testimony was generally that he had no knowledge of the crime and that his confession was false, being a coerced imitation of a statement that had previously been given by his accomplice, Clifford Peele. Defense counsel introduced this theme even before the defense case commenced, during the cross-examination of Agent Collins. Defense counsel elicited from Collins the fact that Clifford Peele had confessed to the crime (J.A. 30-31, 40, 50). Defense counsel then sought to have Agent Collins read Peele's confession to the jury.[2] The State objected on hearsay grounds. Defense counsel responded (J.A. 41):

> Your Honor please, it's very material to the defendant to get this statement of Mr. Peele before this Jury and to question [Agent] Collins concerning this statement and how it is the same or similar to the statement of my client, Joe Peele [sic], that has been read into the record.[3]

The trial court sustained the hearsay objection, observing (J.A. 41-42): "If you want Mr. Peele to state what he knows about it you can call Mr. Peele."

When respondent took the stand, he testified that he had been coercively interrogated, and had decided to confess in response to this interrogation. He claimed that the portions of his statement that accurately described details of the crime had been borrowed, under coercive pressure from the sheriff, from the statement of Peele, which had been repeatedly read to him. J.A. 186-194. He asserted that whenever his unfolding statement diverged from Peele's the sheriff would accuse him of lying and demand that he replicate Peele's account (J.A. 194). Moreover, during the direct examination respondent's counsel inquired of his client (J.A. 190):

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[2] The defense may have still expected at this point that Peele would testify as a prosecution witness. See page 2 note 1, *supra*.

[3] So far as we can discern from the record this argument was made in open court in the presence of the jury.

> Q. And of course that statement of Clifford Peele's implicated you?

Respondent answered in the affirmative (*ibid.*).

c. To rebut respondent's claim that his confession was false and extracted from him by coercive pressure to replicate Peele's confession, the prosecution called Sheriff Papantoniou, who recounted respondent's interrogation. Papantoniou denied respondent's allegations regarding the interrogation, and specifically denied that respondent had been read Peele's statement or that he had been pressured to confess in terms consistent with Peele's confession. Papantoniou further testified that he had not supplied respondent with any of the detailed information concerning the crime contained in respondent's statement (J.A. 270-277, 291).

In connection with Sheriff Papantoniou's rebuttal testimony concerning the genesis of respondent's confession, the prosecution sought to offer Peele's statement in evidence (J.A. 282). The prosecutor explained that the statement was not offered to be considered as evidence of its truth, but to undercut respondent's claim that he had been "fed" the details of his statement, by showing that respondent's statement included details concerning the crime and the crime scene that were not in Peele's statement. The prosecutor argued that, as employed for this limited purpose, Peele's statement was not hearsay, as the defense claimed in objecting to the reading of Peele's statement (J.A. 282-283, 285-288).[4] The trial court concluded (J.A. 286-288) that, because the State offered Peele's statement solely for the purpose of re-

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[4] To the defense's suggestion that the prosecution could call Peele as a witness, the prosecutor explained (J.A. 282-283): "The defense has raised this issue and they have opened the door to permit us to do this. We are not introducing this statement for the facts contained therein * * * [but] to show that the sheriff could not have had knowledge of certain items that were contained in the [respondent's] statement on the 17th because on the 16th when Clifford Peele gave him this statement those facts were not in that statement." See also J.A. 286.

butting respondent's claim that his confession was a coerced imitation of Peele's statement, that statement was not hearsay and its reception did not conflict with the teaching of *Bruton* v. *United States*, 391 U.S. 123 (1968). Before the statement was received, however, the court twice instructed the jury that it was allowed "not for the purpose of proving the truthfulness of his statement, but for the purpose of rebuttal only" (J.A. 292, 293).

Sheriff Papantoniou then proceeded to read Peele's September 16 statement to the jury (J.A. 295-303); the written statement was also introduced in evidence as an exhibit (J.A. 290-291). Peele's account of the genesis of the crime and its commission was generally in accord with the respondent's statement, although Peele perhaps attributed a somewhat more active role in planning the crime to respondent than respondent had acknowledged in his own statement, and portrayed respondent's role in the hanging of Ben Tester as a somewhat more active one than respondent acknowledged in his statement of September 17, 1981.[5] Following the reading of the confession, the prosecution asked the sheriff whether seven particular details regarding the commission of the crime —each of which was in respondent's statement—were reflected in Peele's statement (J.A. 303-304).[6]

The prosecution referred to Peele's statement in its summation only in disputing respondent's claim that he had been pressured into replicating Peele's statement.

[5] Peele stated that he and respondent together "put the loops [of rope] around Ben Tester's head and down around his neck" and that he and respondent together lifted Ben Tester off the tailgate of the pickup truck where he had been carried and allowed rope to tighten around his neck (J.A. 302). As noted above, respondent himself had acknowledged participating in placing the noose around Tester's neck in his statement on June 27, 1982. See page 3, *supra*.

[6] These include the ripping of Ben Tester's shirt, the color and composition of the rope, the source of the gag placed on Tester, and the taking of money from Tester's wallet and shirts from his home (J.A. 303-304).

The prosecutor emphasized the numerous significant details of the crime that appeared solely in respondent's statement, arguing that the only plausible conclusion was that respondent knew these details from his first-hand knowledge of and participation in the crime (J.A. 335-336, 343-344). In his summation defense counsel emphasized that Clifford Peele had not been called as a witness (J.A. 338):

> Oh, they got this statement before you when the sheriff put it in, but I didn't get a chance to ask him any questions, and believe me I wanted to ask him a few.

See also J.A. 339.[7] In instructing the jury the court stated (J.A. 350):

> The Court has allowed an alleged confession or statement by Clifford Peele to be read by a witness.
>
> I instruct you that such can be considered by you for rebutable [sic] purposes only, and you are not to consider the truthfulness of the statement in any way whatsoever.

3. Respondent took an appeal from the judgment of conviction entered on the jury's guilty verdict (J.A. 8). On appeal respondent argued (App. Br. 15-22) that his confession was given under circumstances that rendered it involuntary and that he had been denied the right to counsel. He further argued (App. Br. 5-15) that the reception in evidence of Peele's confession deprived him of his rights under the Confrontation Clause and was contrary to *Bruton*.

The Court of Criminal Appeals reversed (Pet. App. A1-A12). The court initially held that the totality of the circumstances surrounding the making of respondent's confession demonstrated that it was voluntarily given and that respondent had validly waived his right to coun-

[7] In rebuttal argument the prosecution observed that Peele was available to be called as a witness by the defense, as well as the prosecution (J.A. 340). An objection to this argument was overruled (*ibid.*).

sel (*id.* at A4-A6). However, the court held that the introduction of Peele's confession violated respondent's rights under the Confrontation Clause, as construed in *Bruton* (*id.* at A6-A12).

The court acknowledged that the prosecution had employed Peele's statement only in rebuttal and for proper nonhearsay purposes, holding that "the Peele confession as used at trial was not hearsay within traditional rules of evidence" (*id.* at A7). And the appellate court acknowledged that the trial judge had properly instructed the jury "not to consider Peele's statement as proof of [respondent's] guilt * * *" (*id.* at A11). But the court remarked that the State's evidence left "[t]he implication * * * that [Peele's] confession was a true rendition of events on the night of the homicide" (*id.* at A8), and accordingly that "admission of this confession for any purpose constitutes a denial of [respondent's] fundamental right to cross-examine those witnesses against him" (*id.* at A8-A9). The court explained that if Peele had been present, respondent "could have challenged his accusations as well as the authenticity of the confession" (*id.* at A9).

The Court of Criminal Appeals further stated that "no valid state interest [was] served" by the admission of Peele's statement, pointing out that Peele was available to the State and could have been called as a witness. Alternatively, the court held that an effort should have been made to "limit prejudice to [respondent] by redacting incriminating portions of [Peele's] confession." Pet. App. A9. The court asserted (*ibid*):

> From an examination of the confession, this could have been done without detracting from the alleged purpose for which the confession was introduced.

The Court of Criminal Appeals also declined to apply the interlocking confessions doctrine set forth in *Parker* v. *Randolph*, 442 U.S. 62 (1979) (plurality opinion), on the ground that the doctrine should be confined to joint trials where judicial economy considerations may

justify reliance on limiting instructions to prevent prejudice to a defendant who has himself confessed. Alternatively the Court of Criminal Appeals thought the interlocking confessions doctrine inapplicable because "Peele's confession made [respondent] much more a principal actor in the burglary and hanging than the defendant's September 17th confession did" (*id.* at A11). Finally, the Court of Criminal Appeals concluded that the probative value of Peele's statement (if considered for its truth) was so great here as to preclude a finding of harmless error (*id.* at A11-A12).

SUMMARY OF ARGUMENT

A. In *Bruton* v. *United States*, 391 U.S. 123 (1968), the Court prohibited the admission in evidence at a joint criminal trial of a confession by a nontestifying codefendant that incriminates another defendant, but is inadmissible hearsay as to him, because of the risk that a jury will disregard or be unable to follow the limiting instructions given to it, and the devastating impact that would often result to a defendant's case if that risk were realized. In *Parker* v. *Randolph*, 442 U.S. 62 (1979), a plurality of the Court concluded that the risk of devastating unfair prejudice that occasions the *Bruton* rule does not exist at a joint trial where interlocking confessions of both defendants are admitted; Justice Blackmun wrote separately stating that where all defendants have confessed, any *Bruton* error is ordinarily to be regarded as harmless. The question presented by this case is whether *Bruton* requires the exclusion of a nontestifying accomplice's confession at the separate criminal trial of a confessing defendant, where the accomplice's confession, while inculpating the defendant, is offered and admitted solely for the nonhearsay purpose of rebutting the defendant's claim that his own confession was made as a result of coercive interrogation in which he was pressured to replicate the accomplice's confession. The decision below was incorrect in holding that such use is prohibited.

B. *Bruton* is addressed only to the situation in which the nontestifying declarant's statement is inadmissible for any purpose against the defendant. 391 U.S. at 128 n.3. On the other hand, this Court's decision in *Dutton* v. *Evans*, 400 U.S. 74 (1970), makes clear that no confrontation question arises when a declarant's extrajudicial statement is received for some purposes for which it is relevant, other than to establish the truth of the averments contained therein. *Id.* at 88 (plurality opinion); *id.* at 98 (Harlan, J., concurring).

This case is governed by that principle. By disavowing his own confession and urging that he was coerced into duplicating Peele's statement, respondent made it essential that the trier of fact be able to assess the truth or falsity of this claim. And there was no better means of enabling the jury to do that than to place Peele's statement before the jury with appropriate limiting instructions. Those instructions, coupled with the prosecution's carefully focused examination of Sheriff Papantoniou and its equally carefully tailored closing argument, directed the jury's attention exclusively to the question whether Peele's statement supported or refuted respondent's claim of coercion.

Moreover, no alternative means were available to the prosecution by which to secure its legitimate objective. Although the court below stated that redaction would have been feasible and effective here, it did not explain how that could have been accomplished without wholly subverting the purpose for which Peele's statement was offered, and our examination of the record suggests to us that redaction was not a viable alternative here. On the other hand, respondent was fully able to achieve any legitimate objective he had. If he wished to examine Peele regarding the substance of his statement inculpating respondent and believed that Peele would be willing to answer, he was fully capable of calling Peele (conveniently located in the county jail) as a witness.

C. The reception in evidence of Peele's statement is also supported by the decision in *Parker* v. *Randolph*, be-

cause, in light of the reception in evidence of respondent's own confession, the risk of failure to follow the trial court's limiting instruction did not portend serious injury to the defense case. Although respondent's trial was not a joint trial, *Parker* v. *Randolph* is not thereby rendered irrelevant, contrary to the view of the court below. The State's interest in preserving the integrity of the fact-finding process, which supports the admission of Peele's statement, plainly is far more compelling than the judicial economy considerations present in the joint trial situation. And it is especially clear here that consideration of the content of Peele's statement (if the jury ignored the limiting instruction) could have had little incremental adverse impact on the defense case, because respondent's own testimony already had made clear—as it had to in order to make out his defense—that Peele's statement thoroughly implicated him. Thus, upon "weighing *all the circumstances* in order to determine whether the defendant in fact was unfairly prejudiced by the admission of" his nontestifying accomplice's statement (*Parker* v. *Randolph*, 442 U.S. at 79 (opinion of Blackmun, J.) (emphasis added)), it is clear that no error was committed by the trial court in receiving Peele's statement.

ARGUMENT

THE RECEPTION IN EVIDENCE OF PEELE'S CONFESSION DID NOT VIOLATE RESPONDENT'S RIGHTS UNDER THE CONFRONTATION CLAUSE

A. Introduction

In *Bruton* v. *United States*, 391 U.S. 123 (1968), this Court held that the admission in evidence, at a joint criminal trial, of a nontestifying defendant's out-of-court confession, which also incriminated his co-defendant but was inadmissible hearsay as to him, denied the co-defendant the right of cross-examination secured by the Confrontation Clause of the Sixth Amendment. In *Bruton* the district court had given an accurate limiting instruction stating that the confession of the first defendant,

Evans, was admissible as to him but was inadmissible hearsay as to Bruton (who had not himself confessed), and was not to be considered in determining Bruton's guilt. This Court held that the limiting instruction was, in this context, an insufficient safeguard against the prejudice that could result if the jury were to consider Evans' confession as evidence of Bruton's guilt, without the safeguard against unreliable testimony ordinarily provided by cross-examination. 391 U.S. at 135-136.

As a predicate for its ruling in *Bruton* the Court noted, initially, that "the hearsay statement inculpating [Bruton] was clearly inadmissible against him under traditional rules of evidence * * *" (391 U.S. at 128 n.3) and emphasized that "the introduction of Evans' confession added substantial, perhaps even critical, weight to the Government's case * * *" (*id.* at 127-128). The Court explained that there are many circumstances in which it is proper to rely on limiting instructions to confine the jury's consideration of evidence to the purposes for which it is admissible (*id.* at 135), but it viewed the problem created by a joint trial in which only one defendant confesses as exceptional, stating (*id.* at 135-136) that such reliance is unwarranted

> where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

The Court concluded that "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for [the] constitutional right of cross-examination" (*id.* at 137).

The Court's analysis in *Bruton* also laid considerable emphasis upon the availability of alternative procedures to accomplish the legitimate prosecutorial, truth-seeking, and judicial management objectives that were served by the admission of one defendant's confession in a joint trial there. 391 U.S. at 133-134. The Court observed that in some instances redaction of confessions to delete references to defendants other than the author of the confession may be possible. *Id.* at 134 n.10. (This discussion of the possibility of redaction made clear, however, that this approach is not always practicable or effective.) In other cases, the Court explained, a severance is the proper procedure. *Id.* at 131-132, 134-135.

B. Because Peele's Statement Was Admissible For Nonhearsay Purposes Against Respondent, No *Bruton* Error Was Committed By Trial Court

A fair reading of *Bruton* readily discloses that the judgment of the Tennessee Court of Criminal Appeals is ill-founded.

1. We note initially that, unlike Evans' confession in *Bruton*, which, the Court took care to observe, was "clearly inadmissible against [Bruton] under traditional rules of evidence" (391 U.S. at 128 n.3), Peele's statement was admissible against respondent for a proper purpose.[8] Because the prosecution's purpose in placing

[8] The premise of *Bruton* that Evans' statement was inadmissible for any purpose against Bruton, while correct when that case was decided, is not necessarily so under the subsequently adopted Federal Rules of Evidence. If this case were governed by those Rules and Peele had invoked his privilege against self-incrimination, he would have been deemed unavailable to testify. Fed. R. Evid. 804(a). Peele's statement might then have been deemed admissible against respondent for its truth as a declaration against penal interest. See Fed. R. Evid. 804(b)(3); but see advisory committee note accompanying Rule 804(b)(3), 28 U.S.C. App. at page 733 ("[A] statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest."). While the Federal Rules of Evidence abandoned the common law doctrine refusing to recognize a hearsay exception

the statement in evidence was not to prove the truth of Peele's account (either insofar as it incriminated respondent or in other respects), but solely to rebut the claim that respondent had been coerced into replicating Peele's statement, the Court of Criminal Appeals itself acknowledged that "the Peele confession as used at trial was not hearsay within traditional rules of evidence" (Pet. App. A7). Respondent did not argue otherwise in the court below or in his opposition to certiorari in this Court. Moreover, the Tennessee court correctly understood that hearsay has traditionally included only out-of-court statements offered in evidence "to prove the truth of the matter asserted" (Fed. R. Evid. 801(c)). See also advisory committee note on Rule 801(c), 28 U.S.C. App., at page 716; *Dutton* v. *Evans*, 400 U.S. 74, 88 (1970) (plurality opinion).[9]

2. The clear admissibility against respondent of Peele's confession for the nonhearsay purpose for which it was offered is of critical importance to the Confrontation Clause issue. For "there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered in-

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for declarations against penal interest, the framers of those rules did not purport to resolve any confrontation issue created by Rule 804(b)(3). See advisory committee note, 28 U.S.C. App. at page 733. This case, in which the unavailability of Peele was not established and his statement was not admitted on a penal interest rationale, does not require the Court to consider whether the declaration against penal interest exception to the hearsay rule overcomes the confrontation problem in a case like *Bruton*.

[9] Whether or not Peele's statement as used at trial was hearsay is, in the first instance, a question of state law. On the other hand, if state doctrine were in this respect significantly idiosyncratic, the nonhearsay classification of the evidence might be of limited importance in the Confrontation Clause analysis. Cf. *Ohio* v. *Roberts*, 448 U.S. 56, 66 (1980) (statement of unavailable hearsay declarant deemed sufficiently reliable to surmount Confrontation Clause objection "without more" in a case "where the evidence falls within a firmly rooted hearsay exception"; otherwise "particularized guarantees of trustworthiness" must be shown).

admissible; quite the contrary is the case." *United States* v. *Abel*, No. 83-935 (Dec. 10, 1984), slip op. 10; see also *id.* at 8-9. Nor is there any reason to believe that the Confrontation Clause requires application of such a "strange rule of law" (*id.* at 10). See *Dutton* v. *Evans*, *supra*; *United States* v. *Astling*, 733 F.2d 1446, 1455 (11th Cir. 1984).

In *Dutton*, this Court upheld against Confrontation Clause challenge Georgia's co-conspirator declaration exception to the hearsay rule, which was broader than the exception recognized in federal law in that it applied to statements made during the "concealment phase" of a conspiracy. At Evans' trial a prison inmate (Shaw) was permitted to recount a statement incriminating Evans that Shaw said his fellow inmate (Williams), who allegedly had been Evans' accomplice, had made to him. Before turning to the question whether the Georgia co-conspirator declaration rule, which made Williams' out-of-court declaration admissible for the truth of its contents, ran afoul of the Confrontation Clause, Justice Stewart, writing for a plurality, observed (400 U.S. at 88; emphasis added; footnote omitted):

> Evans was not deprived of any right of confrontation on the issue of whether Williams actually made the statement related by Shaw. *Neither a hearsay nor a confrontation question would arise had Shaw's testimony been used to prove merely that the statement had been made.* The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements. *From the viewpoint of the Confrontation Clause, a witness under oath, subject to cross-examination, and whose demeanor can be observed by the trier of fact, is a reliable informant not only as to what he has seen but also as to what he has heard.*

The Court explained (*ibid.*) that the Confrontation Clause issue arose only "because jury was being invited to infer that Williams had implicitly identified Evans as the

perpetrator * * *"—in other words because Williams' declaration was introduced for the purpose of having the jury consider it as a truthful statement evidencing Evans' guilt.[10]

3. This case illustrates the reasonableness of the rule that use of an out-of-court declaration for nonhearsay purposes raises no confrontation question. The State did not seek to introduce Peele's statement as part of its affirmative case. Rather, the prosecution sought to draw the language and exact contents of Peele's confession to the jury's attention as part of its rebuttal case only when respondent had made those facts vitally relevant in a separate connection. By disavowing his confession and claiming specifically that Sheriff Papantoniou had coerced it from him by reading him Peele's statement and demanding that he replicate it, respondent made it entirely appropriate for the State to show the implausibility of that claim.

By what means, then, could the prosecution have rebutted respondent's contention? First, it could and did present the testimony of the sheriff as to what actually occurred during the interrogation of respondent. The sheriff denied that he had read Peele's statement to respondent at all, stating that he had merely shown him Peele's signature on the confession to encourage him to make a statement (J.A. 277). This rebuttal alone would

[10] Justice Stewart's opinion was joined by the Chief Justice and Justices White and Blackmun. Justice Harlan concurred in the judgment, urging that the Confrontation Clause was not intended to regulate the admissibility of evidence, but only to govern procedures relating to testimony by actual trial witnesses, and that a due process analysis should govern the former subject (400 U.S. at 93-100). Justice Harlan plainly did not differ with the plurality's view that use of extrajudicial declarations for nonhearsay purposes raises no constitutional issue. Indeed, he reconciled his due process analysis with *Bruton* and *Douglas* v. *Alabama*, 380 U.S. 415 (1965), stating (400 U.S. at 98; emphasis added): "I would be prepared to hold as a matter of due process that a confession of an accomplice resulting from formal police interrogation cannot be introduced *as evidence of the guilt of an accused* absent some circumstance indicating authorization or adoption."

have left the jury to resolve a swearing contest. But plainly there was a far more telling means of enabling the jury accurately to assess respondent's claim—to allow it to determine, from the contents of the two statements, whether it was likely or even plausible that respondent's statement was an illegitimately conceived clone of Peele's statement.

This is precisely the procedure employed by the State in this case. But the trial court and prosecution did not simply set the jury at large to consider Peele's statement in whatever manner it wished. As we have noted (pages 6 and 7, *supra*) the court repeatedly instructed the jury that Peele's statement was not to be considered for the truth of its contents.[11] As discussed below (pages 25-28), in the absence of circumstances such as those considered in *Bruton*, suggesting an unjustified and potentially devastating risk of unfair prejudice to a defendant resulting from the possibility that such an instruction will not be honored by the jury, this alone suffices to eliminate any Confrontation Clause problem. Moreover, the State did not simply lay the two confessions before the jury and invite it to make an unguided comparison of them. Instead, the rebuttal examination of Sheriff Papantoniou and the State's closing argument were deftly aimed at highlighting specific features of respondent's statement that belied his account of its provenance (see pages 5-7, *supra*).

The prosecutor singled out seven or eight details concerning the crime scene and the course of the commission of the crime that were accurately recounted in respondent's statement. Initially, the prosecution ascertained that the sheriff had not himself divulged these details to respondent (J.A. 276-277), and then that the sheriff had not read Peele's statement to respondent (J.A. 277). Next, the prosecutor had Peele's statement admitted in evidence in written form as an exhibit and orally through the

[11] Respondent has never suggested—much less did he contemporaneously suggest—that the instructions given were in any respect deficient.

sheriff's testimony. This enabled the jury to assess for itself the overall similarities and differences between the two statements.[12]

In this case there were two kinds of significant differences to be discerned. First, respondent's account of his role in the burglary and murder assigns himself a somewhat more passive role than that assigned him by Peele's statement. From this the jury could have inferred that respondent's claim that he had been browbeaten into replicating Peele's statement was at the least suspect. Second, respondent's statement included numerous factual deta.. of the crime that were nowhere to be found in Peele's statement. This strongly reinforced the sheriff's denial that he had "fed" these details to respondent from Peele's statement and undermined respondent's account of the genesis of his confession. This point was underscored after the conclusion of the sheriff's reading of Peele's statement, when the jury's attention was carefully focused on the absence from Peele's statement of the key details found in respondent's account; the sheriff was asked, item-by-item, whether the particular information appeared in Peele's statement, and a negative answer was returned each time (J.A. 303-304).

It was these unaccounted-for discrepancies that formed the centerpiece of the prosecutor's treatment of Peele's statement in his closing argument designed to discredit respondent's disavowal of his own confession (J.A. 335-

[12] Respondent can hardly argue that this was an impermissible purpose, inasmuch as his own counsel had previously sought (albeit unsuccessfully) to do exactly this, on precisely the same rationale (see page 4, *supra*), evidently expecting that respondent's claim would be aided rather than undercut thereby. To be sure, respondent presumably still expected at the earlier juncture that Peele would be called as a prosecution witness. But his own effort to place Peele's confession before the jury in haec verba nonetheless reflects recognition that it was vitally relevant to an issue in the case quite distinct from the truth value of Peele's statements inculpating respondent. Moreover, respondent's abortive effort also reflects recognition that the purpose to be served by placing Peele's statement before the jury could not be achieved by calling him as a witness.

336). The focus of the prosecutor's argument—and its propriety—could scarcely have been clearer (J.A. 336):

> It would have been utterly impossible if—if this man [Sheriff Papantoniou or Agent Collins] was the greatest dramatic coach in the world and—and Joe Street an actor that—ability to memorize, you couldn't get that many details right and the details aren't the same anyway. Joe Street gave [Agent] Collins in that confession information he didn't have before. Information not in Clifford Peele's statement. The only way he knew that, ladies and gentlemen, was he was there, in the truck, standing there putting the noose around Ben Tester's neck.

4. Given the defense raised by respondent, the argument made by the prosecution and the evidence underlying it plainly were vital to the fair development of the prosecution's case and essential to the truth-seeking function of the criminal trial. To have permitted respondent to testify as he did and to argue as he did while denying the State effective means of rebuttal would have been wholly unwarranted. The Tennessee trial court correctly concluded that *Bruton* does not require any such result.

Indeed, nothing in *Bruton* devalues the search for truth. We have already noted that the result reached in *Bruton* rests explicitly on the fact that the codefendant's statement was inadmissible against Bruton under the rules of evidence. *Bruton* also rests upon the recognition that the "pursuit of truth" in that case through the use of a "confession to prove the confessor's guilt" could be achieved by means other than the introduction of a statement inculpating the confessor's co-defendant in a joint trial (391 U.S. at 133-134). Two "alternative ways" of pursuing the truth were available there. The most important was the granting of a severance. A secondary alternative mentioned was the use of a redacted statement that deleted references inculpating the nonconfessing defendant in a joint trial, provided that course

would prove practical and efficacious. *Id.* at 131-132, 133-135 & n.10. But neither of these alternative vehicles for assuring the integrity of the truth-seeking process was available in this case.

Severance obviously was no alternative to the introduction in evidence of Peele's statement for rebuttal purposes. Respondent's trial had already been severed from those of his co-defendants. It was respondent himself who injected Peele's statement into his own case in a manner that undid the benefits of the severance. The Court of Criminal Appeals did assert, however, that Peele's statement could have been redacted "without detracting from the alleged purpose for which the confession was introduced" (Pet. App. A9). This conclusion seems quite clearly unfounded.

We note initially that the Court of Criminal Appeals did not venture any explanation, much less an illustration, as to how redaction might have been accomplished without either frustrating the purpose for which Peele's statement was introduced or failing to reduce the risk that the jury would disregard the instructions limiting the use it could make of Peele's statement. Obviously, the kind of redaction adverted to in *Bruton*, "deletion of references to [the nonconfessing] codefendant" (391 U.S. at 134 n.10), would make it impossible for the jury to evaluate respondent's claim that his statement was a coerced imitation of Peele's. This approach would not only have frustrated the prosecution's legitimate objective; it could well have prejudiced respondent, creating an artificial difference between his statement and Peele's in the eyes of the jury and making it appear that he alone had indicated that he was a participant in the crime. It was perhaps for this reason that respondent did not argue in the court of appeals that redaction was a viable approach that should have been required and has never explained how the Court of Criminal Appeals' uninformative suggestion could have been carried out.

Nor are we able to conceive of any more subtle method of redaction that would have been both practical and efficacious here. Because the primary thrust of the State's rebuttal argument was that respondent's statement contained significant details absent from Peele's account of the crime, the jury needed to be able to consider all of Peele's statement. Even if Peele's statement were deemed potentially damaging, if considered as evidence of respondent's guilt by the jury, because it assigned respondent a somewhat more prominent role in the planning of the burglary and the actual assault on and hanging of Ben Tester, it would have been a hazardous and misleading enterprise to delete these portions of Peele's statement. Redaction of this sort would have been difficult to accomplish without impermissibly rewriting Peele's statement and confusing the jury; moreover, it would have hampered the jury in a significant respect, for the very differences between the two confessions as to respondent's role would necessarily be a focus of consideration in assessing respondent's claim that he had been forced to copy Peele's statement. Thus it is evident that, because of the nature of the defense claim being rebutted, redaction was not a viable alternative here.[13]

5. As we have noted, the admissibility of Peele's statement for nonhearsay rebuttal purposes, and for those

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[13] Respondent did not propose redaction in the trial court. Following admission of Peele's statement in written form, but before Sheriff Papantoniou had commenced reading the statement, defense counsel did seek to bar its reading, suggesting that the prosecutor or the witness simply be permitted to point out the disparities between the two statements (J.A. 293). The court determined that the prosecutor had latitude to accept or reject this suggestion (J.A. 293, 295). For the reasons stated in the text, this approach would have given the jury an unduly limited field for examining the competing contentions, and would in all likelihood have actually undercut respondent's claim that his confession was an involuntary imitation of Peele's. At least absent an appropriate stipulation between the parties, it would appear undesirable to keep from the jury the best evidence as to the plausibility of respondent's claim.

purposes only, was repeatedly emphasized to the jury by the trial judge (see pages 6 and 7, *supra*). The independent admissibility of Peele's statement for a proper purpose serves to distinguish this case from *Bruton* in yet another respect, for it lends added credibility in the context of the case to the "crucial assumption underlying [the jury trial] system * * * that juries will follow the instructions given them by the trial judge." *Parker* v. *Randolph*, 442 U.S. 62, 73 (1979) (plurality opinion). Of course *Bruton* stands for the proposition that this assumption has its limits; but rather than calling in question the general validity of this well-established general rule, *Bruton* reaffirms the rule, announcing only a limited exception thereto. *Bruton*, 391 U.S. at 135-136; *Parker* v. *Randolph*, 442 U.S. at 73-74; see page 12, *supra*. And recent decisions of this Court reaffirm the vitality of the basic assumption in this Court's jurisprudence. *Marshall* v. *Lonberger*, 459 U.S. 422, 438 & n.6 (1983).

Quite apart from the considerations that suggest that relatively little incremental prejudice would have been suffered by respondent if the jury was unable to obey the limiting instructions (see pages 25-28, *infra*), the risk of misuse of the evidence was itself markedly reduced in this case because the evidence was admissible as to respondent for a clearly defined purpose distinct from proving his participation in the crime. Undoubtedly there are circumstances in which it is simply unrealistic to expect a jury to abide by instructions requiring it to put wholly out of mind the inculpatory confession of one defendant in determining the guilt of another defendant at a joint trial, while considering that confession unreservedly in determining the guilt of the confessor. Here, however, in contrast to *Bruton*, the confession was not introduced for its truth at all; the mental discipline expected of a jury in a case such as this, when evidence is admissible as against the sole defendant in a severed trial but for a limited purpose, is a more realistic requirement, and one that the law generally presumes jurors to be capable of carrying out.[14]

Moreover, the record in this case confirms that when evidence admissible for a limited purpose is relevant to a significant discrete issue in a criminal trial, the jury's attention may be effectively focused upon the issue in connection with which the evidence is admissible. As we have explained, in this case this channeling effort did not rest upon the court's legal instructions alone. On the contrary, the entire course of the examination by which Peele's statement was elicited and its salient characteristics drawn in relief, and the prosecution's carefully confined summation addressing that evidence, served as a powerful safeguard against jury error as to the proper use of Peele's statement in this case.

6. Because of the distinctive and limited purpose for which Peele's statement was received in evidence, the practical consequences of discerning a Confrontation Clause violation in the reception of Peele's statement here would be peculiar indeed. The implication of finding a Confrontation Clause violation in this case, of course, is that the prosecution should have called Peele to testify as a witness if it wished to rebut respondent's claim that his confession was coerced. Paradoxically, however, while calling Peele to testify might have added to the prosecution's case in other respects (assuming Peele did not invoke his privilege against self-incrimination (see pages 2-3 note 1, *supra*)), it would have been wholly ineffective to make the point for which Peele's statement was introduced in evidence.[15] Conversely, while respondent

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[14] See, *e.g.*, *United States* v. *Abel*, slip op. 10; *Jenkins* v. *Anderson*, 447 U.S. 231, 237-238 (1980); *Oregon* v. *Hass*, 420 U.S. 714, 721-722 (1975); *Harris* v. *New York*, 401 U.S. 222, 225-226 (1971); *Spencer* v. *Texas*, 385 U.S. 554, 562 (1967).

[15] In this respect, the situation resembles that in which a prior consistent statement of a witness, though ordinarily inadmissible, is properly used to rebut a claim of recent fabrication. Fed. R. Evid. 801(d)(1)(B). In such circumstances, no amount of trial

might have cross-examined Peele (assuming he testified and adhered to his prior statement) as to inculpatory statements made about respondent, such cross-examination would be wholly ineffective to undercut the prosecution's use of Peele's confession to rebut respondent's disavowal of his own confession.

As a consequence it is scarcely evident that respondent would have been better off if the prosecution had called Peele as a witness in its affirmative case. In the circumstances, instead of forcing the prosecution's hand by requiring it to call a witness who could be cross-examined only as to matters distinct from those for which the State wished to employ his statement, it was sensible to leave to respondent the choice as to whether to call Peele, the declarant, as a witness in court. See *Dutton* v. *Evans*, 400 U.S. at 88 n.19 (plurality opinion). We note that Peele was equally available to the prosecution and the defense in this case. All counsel were aware that he had been brought to the Unicoi County Jail so that he would be available to testify if called. Thus this is not a case like *Barber* v. *Page*, 390 U.S. 719 (1968), or *Ohio* v. *Roberts*, 448 U.S. 56 (1980), where the prosecution, because of its superior resources, or governmental authority, has significantly greater ability than the defense to locate an out-of-court declarant and thereby make live testimony and confrontation possible. Here, respondent was practically and legally free to call Peele as a witness, and presumably free to cross-examine him if he proved a hostile one. Cf. *Ohio* v. *Roberts*, 448 U.S. at 70-73. It is difficult to discern how respondent was injured by requiring him to decide whether, given the prosecution's election not to call Peele as a witness to testify on matters pertaining to respondent's guilt or innocence, he should bring Peele's testimony before the jury in that connection.

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testimony by the witness can substitute for evidence of the out-of-court statement.

C. Because The Impact Of Peele's Statement, Even If Considered As Evidence Of Respondent's Guilt, Was Limited, The Reception Of That Statement With An Appropriate Limiting Instruction Was Not Error

In *Parker* v. *Randolph*, the Court upheld the convictions of defendants rendered after a joint trial in which none of the defendants testified and the out-of-court confession of each was admitted in evidence with a limiting instruction permitting it to be used as evidence only against the defendant who gave it. Justice Rehnquist, joined by the Chief Justice and Justices Stewart and White, concluded that, given that each defendant had himself confessed, the impact on each one's defense of the possibility that the jury disregarded its limiting instructions, even if realized, was insufficiently great to warrant separate trials or exclusions of the confessions. 442 U.S. at 69-76. Justice Blackmun concurred in the judgment (*id.* at 77-81) on the ground that any *Bruton* error was harmless beyond a reasonable doubt, observing that in "most interlocking-confession cases, any error in admitting the confession of a nontestifying codefendant will be harmless beyond a reasonable doubt" (*id.* at 79), while refusing to "adopt a rigid *per se* rule that forecloses a court from weighing all the circumstances in order to determine whether the defendant in fact was unfairly prejudiced by the admission of even an interlocking confession" (*ibid.*).[16]

The Court of Criminal Appeals declined to apply the analysis of the *Parker* v. *Randolph* plurality on the ground that the "interlocking confessions doctrine" had no application to the separate trial of a single defendant (Pet. App. A10) and that Peele's statement attributed to respondent a sufficiently enhanced role in the hanging to render the confessions noninterlocking for *Bruton* purposes (Pet. App. A11). These comments reflect a serious misunderstanding of the proper analysis in a case such as this.

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[16] Justice Powell did not participate. Justices Stevens, Brennan, and Marshall dissented.

1. To be sure, the judicial (and prosecutorial) economy rationale for joint trials may help to explain why the residual risk of prejudice, however slight, that remains for a *confessing* defendant when a co-defendant's confession is admitted in evidence with an appropriate limiting instruction at a joint trial is to be deemed acceptable, rather than merely harmless error. That factor concededly has no bearing on this case. But, as we have explained in the preceding section of this brief, the Tennessee Court of Criminal Appeals overlooked the fact that there is here a reason much more substantial than mere efficiency—one central to the integrity of the fact-finding process for which courts are constituted—for permitting the admission, for limited purposes, of a nontestifying accomplice's confession: the evidence was necessary for the nonhearsay purpose of determining the truthfulness of respondent's testimony that his confession was involuntary. Thus, contrary to what the court below seemed to believe, the prosecution's interest in being able to introduce the nontestifying accomplice's confession here is far weightier than that in *Parker* v. *Randolph*.

On the other hand, for the reasons stated by Justice Rehnquist in *Parker* v. *Randolph*, the risk of "devastating" impact upon a defendant who does not confess flowing from admission in evidence of an accomplice's confession, which the Court perceived in *Bruton*, is simply absent here. 442 U.S. at 72-73, 74-75. In this context, a properly framed limiting instruction is an adequate safeguard against denial of confrontation rights. *Id.* at 73-74. Even if this were not generally true in the case of interlocking confessions, it is assuredly true where, as here, the purpose for which the accomplice's confession was adduced, and the forceful and effective manner in which the jury's attention was directed to that specialized purpose, greatly reduced the risk that the accomplice's confession would be considered for its truth.

The record of this case plainly demonstrates that the reception of Peele's confession had no serious—much less

devastating—impact upon respondent. Given his account on direct examination of the origins of his confession, the jury was already apprised from respondent's own testimony that Peele had implicated him thoroughly in the murder of Ben Tester. Thus, prior to the first mention of the contents of Peele's statement by a prosecution witness, respondent himself confirmed to the jury, in response to his own counsel's question, that Peele's statement had implicated him (see pages 4-5, *supra*). By the time the prosecution presented Peele's actual statement, the defense had let the cat out of the bag. The only significant incremental impact of reading Peele's statement was thus to enable the jury to assess the claim raised by respondent that his statement was purely derivative of Peele's and was involuntary and untrue.

2. We also believe that the Court of Criminal Appeals erred in holding the interlocking confessions doctrine factually inapplicable. The court substantially exaggerated the differences between respondent's confession and Peele's statement. Although Peele did assign a somewhat more prominent role to respondent in planning the burglary and executing the hanging of Ben Tester, it is doubtful that these differences were material. Without undertaking a detailed examination of the elements of the offenses under Tennessee law, we believe that respondent by his own confession fully incriminated himself on a premeditated murder theory;[17] even if he did not, he undeniably did so as to the alternative felony murder theory. In these circumstances, the Court of Criminal Appeals' conclusion is inconsistent with the plurality's analysis in *Parker* v. *Randolph* (see 442 U.S. at 80 (opinion of Blackmun, J.) (congruence of confessions not a prerequisite for admissibility under plurality's analysis)) and with the better view of the "interlocking

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[17] The Court of Criminal Appeals appears to have overlooked respondent's additional confession of June 27, 1982 (see page 3, *supra*) in suggesting (Pet. App. A11) that only Peele's statement implicated respondent in placing the rope around Tester's neck.

confessions doctrine." See *Tamilio* v. *Fogg*, 713 F.2d 18, 20-21 (2d Cir. 1983), cert. denied, No. 83-649 (Jan. 9, 1984).

3. There is no need, however, to decide in this case what degree of congruence should generally be required as a predicate for applying an interlocking confessions exception to *Bruton*, or even whether such an exception should generally be recognized. As we have explained in the preceding section of this brief, the prosecution had a compelling justification for placing Peele's statement before the jury in this case, and no alternative means were available for securing that legitimate prosecutorial objective. In determining whether it was constitutional error to receive Peele's statement for the limited purpose for which it was offered, the Court must weigh that justification against the risk of unfair prejudice created, which in the circumstances presented was minimal. In light of the overall balance between prosecutorial need for introducing Peele's statement and the potential for unfair prejudice to respondent, it is plain that respondent was not deprived of any constitutional right protected by the Confrontation Clause.[18]

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[18] We note that the analysis we propose is not necessarily inconsistent with Justice Blackmun's view that it is desirable to employ a more flexible approach to assessing *Bruton* claims than that attributed to the plurality in *Parker* v. *Randolph*. On the other hand, we do not embrace a harmless error analysis, which in many situations, including this case, would send precisely the wrong message to trial courts—*i.e.*, that the evidence in question should *not* be received. As this case illustrates, there is no reason to limit to appellate courts the mandate to "*weigh*[] *all the circumstances* in order to determine whether the defendant in fact was [or would be] *unfairly* prejudiced by the admission of" a nontestifying accomplice's confession. 442 U.S. at 79 (opinion of Blackmun, J.) (emphasis added). Cf. Fed. R. Evid. 403.

CONCLUSION

The judgment of the Court of Criminal Appeals of Tennessee should be reversed.

Respectfully submitted.

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